

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

MARK A. LARACE,  
TAMMY L. LARACE

Petitioners

v.

WELLS FARGO BANK, N.A. AS  
TRUSTEE FOR ABFC 2005-OPT1 TRUST  
ABFC ASSET BACKED CERTIFICATES  
SERIES 2005-OPT1, AMERICAN HOME  
MORTGAGE SERVICING, OPTION ONE  
MORTGAGE COMPANY,

Respondents

CIVIL ACTION NO. 12-cv-11545 KPN

**RESPONDENTS, WELLS FARGO BANK, N.A. AS TRUSTEE FOR ABFC 2005-OPT1  
TRUSTEE ABFC ASSET BACKED CERTIFICATES SERIES 2005-OPT1'S AND  
HOMEWARD RESIDENTIAL, INC. F/K/A AMERICAN HOME MORTGAGE  
SERVICING, INC.'S MOTION TO DISMISS PETITION TO TRY TITLE PURSUANT  
TO G. L. c. 240, § § 1-5**

Wells Fargo Bank, N.A. as Trustee for ABFC 2005-OPT1 Trustee ABFC Asset Backed Certificates Series 2005-OPT1 (“Wells Fargo as Trustee”) and Homeward Residential, Inc. f/k/a American Home Mortgage Servicing, Inc. (“Homeward”) (collectively “Respondents”) hereby move to dismiss the Petition to Try Title (“Petition”) brought by Mark A. Larace and Tammy L. Larace (“Petitioners”) pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The Petition is based on the erroneous conclusion that the Massachusetts Supreme Judicial Court’s decision in *U.S. Bank Nat’l Ass’n v. Ibanez*, 458 Mass. 637 (2011) invalidated the Assignment of Mortgage assigning Petitioners’ mortgage to Wells Fargo as Trustee. However, since Wells Fargo as Trustee is the mortgagee and current holder of the Petitioners’ mortgage and Petitioners are still the mortgagors, the Petition pursuant to M.G.L. c. 240, § § 1-5 is improper because there can be no adverse claim between a mortgagor and

mortgagee as a matter of law. Moreover, the Petition asserts no allegations against Homeward other than claiming that it is engaged in the business of “mortgage servicing.” As such, the Petitioners also cannot maintain an action against Homeward as they have failed to identify an adverse claim against them. Thus, the Petition as to Homeward should be dismissal as well.

Wells Fargo as Trustee and Homeward submit the accompanying Memorandum in Support of this Motion, which is incorporated by reference herein.

WHEREFORE, Respondents request this Honorable Court grant their Motion to Dismiss the Petitioners’ Petition to Try Title.

Respectfully submitted,  
Wells Fargo Bank, N.A. as Trustee for ABFC 2005-  
OPT1 Trustee ABFC Asset Backed Certificates Series  
2005-OPT1 and Homeward Residential, Inc. f/k/a  
American Home Mortgage Servicing, Inc.  
By Their Attorneys,

/s/ Justin M. Fabella  
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Date: September 7, 2012

### **CERTIFICATE OF SERVICE**

I, Justin M. Fabella, hereby certify that the documents filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on September 7, 2012.

/s/ Justin M. Fabella  
Justin M. Fabella